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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 MICHAEL NELSON,

10 Plaintiff,

11 v.

12 CANON USA, INC., a New York
13 Corporation, and John Does I-V,

14 Defendants.

C07-503Z

ORDER

15 THIS MATTER came before the Court on motion of defendant Canon USA, Inc.
16 (“Canon”) for summary judgment on all of plaintiff’s claims, as well as on all of Canon’s
17 counterclaims, see docket no. 26. Having reviewed all papers filed in support of and in
18 opposition to Canon’s motion, and having previously issued a Minute Order ruling on said
19 motion, see docket no. 45, the Court hereby enters the following explanatory order.

20 **Background**

21 Plaintiff Michael Nelson is the sole proprietor of Capital Films, a television and
22 commercial production company. Nelson Dep. at 39:11-15, 45:12-25, Exh. A to Marchese
23 Decl. (docket no. 26-2) [hereinafter “Nelson Dep.”]. From March 1992 through February
24 1998, Capital Films was located at 6351 Seaview Avenue NW in Seattle. Exh. A to Bender
25 Decl. (docket no. 26-3); Nelson Dep. at 41:14-22. In 2003, Capital Films began advertising
26 high-definition (“HD”) capabilities. Nelson Dep. at 55:11-13, 22-25. Shortly thereafter,

1 plaintiff met Tom Bender, Assistant Director of Canon's Broadcast and Communications
2 Division, at a trade show held in the Washington State Convention Center. Bender Decl. at
3 ¶¶ 2 & 4; Nelson Dep. at 56:1-3. During the course of this meeting, plaintiff gave
4 Mr. Bender a business card on which only the defunct Seaview Avenue address appears.
5 Bender Decl. at ¶ 4 & Exh. A.

6 Sometime after the meeting, in October 2003, Canon agreed to loan plaintiff, on a
7 demonstration basis for 30 days, a high-definition lens (model HJ15X8BWRS) valued at
8 \$23,000. Bender Decl. at ¶ 5; Statement at 2, Exh. J to Bender Decl.; Nelson Dep. at 80:14-
9 15, 86:11-87:2, 90:3-8, 92:18-20. The demonstration loan was handled by VMI, Inc., a
10 dealer of Canon products. Bender Decl. at ¶ 5. According to plaintiff, Larry Sharpe of VMI,
11 Inc. personally delivered the lens to plaintiff at plaintiff's home located on Ashworth Avenue
12 North in Seattle. Nelson Dep. at 80:9-15, 83:3-5. In contrast, Mr. Bender has indicated that
13 plaintiff picked up the lens from VMI, Inc. Bender Decl. at ¶ 6. The parties agree, however,
14 that, when plaintiff acquired the lens, he signed a packing list, thereby acknowledging
15 receipt of the lens on a "DEMO LOAN" basis. Exh. C to Bender Decl.; Nelson Dep. at
16 86:11-87:2.

17 The 30-day demonstration period passed and plaintiff neither paid for the lens nor
18 returned it to Canon or VMI, Inc. Nelson Dep. at 99:2-3. In May 2004, Mr. Bender issued
19 on behalf of Canon an invoice for the lens, showing the previously agreed discounted price
20 of \$14,500; the invoice was mailed to the Seaview Avenue address, as well as to a post
21 office box for Capital Films. Bender Decl. at ¶ 8 & Exh. D. Plaintiff received the invoice,
22 but did not pay the amount due. Nelson Dep. at 99:2-3, 106:21-107:22. Canon took other
23 steps to collect the outstanding balance, but without success. Bender Decl. at ¶¶ 9-12.

24 In May 2006, Mr. Bender learned from a photographer based in Hawaii that plaintiff
25 was attempting to sell the lens on eBay. Bender Decl. at ¶ 13 & Exh. G. Canon contacted
26 the Seattle Police Department, which arranged a "sting" operation during which plaintiff met

1 an undercover detective posing as “Scott Miller” at the Starbucks in the University Village
2 and exchanged the lens and a camera for a Bank of America cashier’s check made payable to
3 Michael Nelson in the amount of \$30,000. Bender Decl. at ¶ 14; Exhs. C & E to Marchese
4 Decl.; Nelson Dep. at 131:22-25, 132:3-4, 133:2-10, 134:15-22. Plaintiff was arrested and
5 spent two days in jail. Amended Complaint at ¶ 3.10 (docket no. 34). The King County
6 Prosecuting Attorney’s Office apparently declined to file criminal charges. See Motion for
7 Summary Judgment at 8 (docket no. 26).

8 In March 2007, plaintiff filed a complaint in King County Superior Court against
9 Canon, alleging defamation, intentional infliction of emotional distress, outrage, intentional
10 interference with business expectancy, malicious harassment, malicious prosecution, and
11 violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. Exh. A to
12 Notice of Removal (docket no. 1). Plaintiff was subsequently granted leave to amend his
13 complaint to dismiss the Fair Debt Collection Act claim, and his related motion to remand
14 this matter to state court was denied. Minute Order (docket no. 24); Minute Order (docket
15 no. 35). Canon asserted counterclaims for conversion, fraud, violation of the CPA, breach of
16 contract, goods sold and delivered, and unjust enrichment, see Answer (docket no. 8), and
17 subsequently moved for summary judgment in its favor on all claims and counterclaims.

18 **Discussion**

19 **A. Summary Judgment Standard**

20 The Court must grant summary judgment if no genuine issue of material fact exists
21 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The
22 moving party bears the initial burden of demonstrating the absence of a genuine issue of
23 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is material if it
24 might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby,
25 Inc., 477 U.S. 242, 248 (1986). In support of its motion for summary judgment, the moving
26 party need not negate the opponent’s claim, Celotex, 477 U.S. at 323; rather, the moving

1 party will be entitled to judgment if the evidence is not sufficient for a jury to return a verdict
2 in favor of the opponent, Anderson, 477 U.S. at 249.

3 When a properly supported motion for summary judgment has been presented, the
4 adverse party “may not rest upon the mere allegations or denials” of its pleadings. Fed. R.
5 Civ. P. 56(e). The non-moving party must set forth “specific facts” demonstrating the
6 existence of a genuine issue for trial. Id.; Anderson, 477 U.S. at 256. A party cannot create
7 a genuine issue of fact by simply contradicting his or her own previous sworn statement,
8 Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999), or by asserting “some
9 metaphysical doubt” as to the material facts, Matsushita Elec. Indus. Co. v. Zenith Radio
10 Corp., 475 U.S. 574, 586 (1986). Likewise, discrediting the testimony proffered by the
11 moving party will not usually constitute a sufficient response to a motion for summary
12 judgment. Anderson, 477 U.S. at 256-57.

13 To survive a motion for summary judgment, the adverse party must present
14 affirmative evidence, which “is to be believed” and from which all “justifiable inferences”
15 are to be favorably drawn. Id. at 255, 257. When the record, however, taken as a whole,
16 could not lead a rational trier of fact to find for the non-moving party, summary judgment is
17 warranted. See Miller v. Glenn Miller Prod., Inc., 454 F.3d 975, 988 (9th Cir. 2006); see
18 also Beard v. Banks, 126 S. Ct. 2572, 2578 (2006) (“Rule 56(c) ‘mandates the entry of
19 summary judgment, after adequate time for discovery and upon motion, against a party who
20 fails to make a showing sufficient to establish the existence of an element essential to that
21 party’s case, and on which that party will bear the burden of proof at trial.’” (quoting
22 Celotex, 477 U.S. at 322)).

23 **B. Plaintiff’s Claims**

24 With regard to his claims for intentional infliction of emotional distress and malicious
25 harassment, plaintiff provided no response to Canon’s motion for summary judgment, and
26 the Court inferred therefrom that plaintiff conceded those claims lack merit. See Local Rule

1 CR 7(b)(2). In addition, the Court has concluded that, as a matter of law, Canon is entitled
2 to judgment on those claims. Intentional infliction of emotional distress constitutes the same
3 tort as outrage, which is separately alleged, *Kloepfel v. Bokor*, 149 Wn.2d 192, 193 n.1, 66
4 P.3d 630 (2003), and plaintiff has not provided any evidence that Canon's actions were
5 based on plaintiff's race, gender, or other immutable characteristic, which is an element of
6 malicious harassment, *see* RCW 9A.36.083; RCW 9A.36.080. Thus, the Court has
7 DISMISSED with prejudice plaintiff's second (intentional infliction of emotional distress)
8 and fifth (malicious harassment) causes of action.

9 As to his claim of outrage, plaintiff offered no support. To prove outrage, plaintiff
10 must show (i) extreme and outrageous conduct; (ii) intentional or reckless infliction of
11 emotional distress; and (iii) actual result to plaintiff of severe emotional distress. *Kloepfel*,
12 149 Wn.2d at 195. The tort of outrage must be predicated on behavior "so outrageous in
13 character, and so extreme in degree, as to go beyond all possible bounds of decency, and to
14 be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 196
15 (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)). Here, even making
16 every reasonable inference in favor of plaintiff, Canon's activities do not, as a matter of law,
17 rise to the requisite level of atrociousness and intolerability. For Canon to seek police
18 assistance in retrieving its lens after over two and a half years of nonpayment by plaintiff is
19 simply not the type of conduct sought to be discouraged via the tort of outrage. Thus, the
20 Court has DISMISSED with prejudice plaintiff's third cause of action.

21 With respect to his defamation claim, plaintiff has not provided any evidence that
22 Canon made false statements.¹ Rather, plaintiff merely described information Mr. Bender
23

24 ¹ Although plaintiff referred to a string of e-mail messages, plaintiff did not provide such
25 correspondence to the Court. Plaintiff's counsel apparently intended to attach certain documents to
26 his declaration, but no exhibits were actually filed with the Court. Plaintiff received notice of this
inadvertent omission when Canon filed its reply brief on January 11, 2008, *see* Reply at 4 n.2 (docket
no. 40), but he has done nothing since that time to correct the oversight.

1 allegedly “avoided telling the Seattle Police Department.” Response at 10 (docket no. 37).
2 Thus, the Court has construed plaintiff’s first cause of action as asserting only “defamation
3 by omission.” To establish a prima facie case, plaintiff must demonstrate *inter alia* that the
4 communication at issue “left a false impression that would be contradicted by the inclusion
5 of omitted facts.” *See Mohr v. Grant*, 153 Wn.2d 812, 827, 108 P.3d 768 (2005). “Merely
6 omitting facts favorable to the plaintiff or facts that the plaintiff thinks should have been
7 included does not make a publication false and subject to defamation liability.” *Id.*

8 Here, plaintiff has complained that Mr. Bender did not tell police about a “sale
9 agreement” and about the invoice issued in May 2004. Canon has replied that, in preparing
10 the Certification for Determination of Probable Cause (“PC Certification”), Seattle police
11 were aware of the demonstration loan and the subsequent invoice. Although the
12 PC Certification expressly refers to the packing list, sales order worksheet, and invoice,
13 neither Mr. Bender’s nor Detective Renihan’s statements discuss such items, and all of the
14 police-generated documents were drafted after plaintiff was arrested on May 31, 2006. *See*
15 Marchese Decl. at Exh. C (PC Certification dated June 23, 2006) & Exh. D (Renihan
16 Statement dated June 7, 2006); Bender Decl. at Exh. J (Bender Statement dated June 8,
17 2006). Thus, the Court has concluded that genuine issues of material fact exist concerning
18 whether Canon engaged in actionable omissions, and the Court has DENIED Canon’s
19 motion for summary judgment concerning plaintiff’s first cause of action.

20 For similar reasons, the Court has also DENIED Canon’s motion for summary
21 judgment with regard to plaintiff’s fourth (interference with business expectancy) and sixth
22 (malicious prosecution) causes of action. To prove tortious interference with a contractual
23 relationship or business expectancy, plaintiff must show (i) the existence of a valid
24 contractual relationship or business expectancy; (ii) Canon’s knowledge of that relationship
25 or expectancy; (iii) an intentional interference inducing or causing a breach or termination of
26 the relationship or expectancy; (iv) an improper purpose or use of an improper means for the

1 interference; and (v) resultant damage. *See Leingang v. Pierce County Med. Bureau, Inc.*,
2 131 Wn.2d 133, 157, 930 P.2d 288 (1997). Here, plaintiff contends that Canon interfered
3 with his potential sale of equipment to Mick Kalber, a photographer based in Hawaii, the
4 proceeds of which he could have used to pay debts owed to Canon and others. Canon argues
5 that plaintiff had no legal right to sell the lens without first paying for it. Canon, however,
6 has cited no legal authority to support this contention. Therefore, the Court has concluded
7 that genuine issues of material fact exist as to, among other things, whether plaintiff had a
8 valid expectancy and whether Canon's interference had an improper purpose or used an
9 improper means.

10 To establish malicious prosecution, plaintiff must demonstrate (i) Canon instituted or
11 continued the prosecution at issue; (ii) the institution or continuation of the prosecution
12 lacked probable cause; (iii) the proceedings were instituted or continued through malice; (iv)
13 the proceedings terminated on the merits in favor of plaintiff or were abandoned; and (v)
14 plaintiff suffered injury or damage as a result of the prosecution. *See Peasley v. Puget Sound*
15 *Tug & Barge Co.*, 13 Wn.2d 485, 497, 125 P.2d 681 (1942). A claim of malicious
16 prosecution may be premised upon a wrongful arrest, as opposed to the filing of criminal
17 charges. *See State v. Chenoweth*, 160 Wn.2d 454, 468 n.13, 158 P.3d 595 (2007). Canon
18 asserts that plaintiff is required to show Canon knew plaintiff's arrest was not supported by
19 probable cause. Such knowledge, however, is not an element of the claim, but rather would
20 be evidence of malice.

21 Canon has also cited to the statute defining the crime of "theft of rental, leased, lease-
22 purchased, or loan property," as support for its contention that probable cause existed to
23 arrest plaintiff. The statute, however, requires proof of a written loan agreement and either
24 direct proof of intent or indirect proof, which can take the form of receipt by the borrower of
25 notice to return the property or presentation by the borrower of false or inaccurate
26 identification at the time of the loan. RCW 9A.56.096. Here, the only memorialization of

1 the agreement between Canon and plaintiff is the packing list bearing plaintiff's signature;
2 however, neither the term of the loan nor the return date are stated on that document. Exh. C
3 to Bender Decl. The Sales Order Worksheet associated with the transaction contains a due
4 date of November 28, 2003, but it does not appear to have plaintiff's signature or initials. *Id.*
5 Moreover, although Canon sent an invoice and a past due letter to plaintiff, Exhs. D & E to
6 Bender Decl., at the time of plaintiff's arrest, Canon had no indication that plaintiff received
7 either document, and neither document demanded return of the lens. Finally, a dispute exists
8 concerning what contact information plaintiff provided or was otherwise available to Canon.
9 Thus, the Court has concluded that genuine issues of material fact exist concerning, among
10 other things, whether plaintiff's arrest was supported by probable cause and whether Canon
11 acted out of malice.

12 As a final matter, Canon argues that it is entitled to summary judgment on all of
13 plaintiff's claims because plaintiff has presented no evidence of damages. Although the
14 Court has discounted plaintiff's allegation that he lost his rights to vote, run for office, and
15 bear arms, which are not consequences of mere arrest, but rather of conviction, the Court has
16 concluded that plaintiff has sufficiently raised genuine issues of fact concerning damages.
17 Canon does not dispute that plaintiff spent two days in jail, which alone is a compensable
18 injury, and plaintiff alleges the loss of sale proceeds, injury to reputation, and emotional
19 distress. Therefore, the Court has DENIED Canon's motion for summary judgment to the
20 extent it was based on lack of damage.

21 **C. Canon's Counterclaims**

22 Canon's counterclaims for conversion, fraud, breach of contract, goods sold and
23 delivered, and unjust enrichment arise from the same nucleus of facts and constitute
24 alternative theories of liability. For reasons similar to those stated earlier, the Court has
25 concluded that, with one exception, namely the CPA counterclaim, genuine issues of
26 material fact preclude summary judgment in favor of either party on Canon's various

1 counterclaims. The Court will assess at a later date how best to instruct the jury to avoid
2 double recovery on Canon's part.

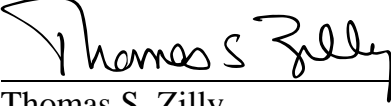
3 With regard to Canon's counterclaim under the CPA, the Court has concluded that
4 Canon has failed to present a prima facie case. To establish a violation of the CPA, a private
5 plaintiff must prove (i) the defendant engaged in an unfair or deceptive act or practice; (ii)
6 such act or practice occurred within a trade or business; (iii) such act or practice affected the
7 public interest; (iv) the plaintiff suffered an injury to his or her business or property; and
8 (v) a causal relationship exists between the defendant's act or practice and the plaintiff's
9 injury. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785-
10 93, 719 P.2d 531 (1986). The dispute at issue here concerns no more than an alleged breach
11 of a private agreement, which does not affect the public interest. Canon has offered no
12 evidence that others have been or will be injured in exactly the same fashion. *See Sloan v.*
13 *Thompson*, 128 Wn. App. 776, 792, 115 P.3d 1009 (2005) ("[I]t is the likelihood that
14 additional plaintiffs have been or will be injured in exactly the same fashion that changes the
15 factual pattern from a private dispute to one that affects the public interest." (quoting
16 *Hangman Ridge*, 105 Wn.2d at 790)). Thus, the Court has sua sponte GRANTED partial
17 summary judgment in favor of plaintiff on Canon's CPA counterclaim and DISMISSED the
18 counterclaim outlined in ¶¶ 3.26 - 3.30 of Canon's Answer.

19 Conclusion

20 For the foregoing reasons, the Court has GRANTED partial summary judgment in
21 favor of Canon and DISMISSED with prejudice plaintiff's second, third, and fifth causes of
22 action. In all other respects, the Court has DENIED Canon's motion for summary judgment.
23 The Court has also sua sponte GRANTED partial summary judgment in favor of plaintiff and
24 has DISMISSED with prejudice Canon's counterclaim brought under Washington's
25 Consumer Protection Act.
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1 IT IS SO ORDERED.

2 DATED this 12th day of February, 2008.

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5 Thomas S. Zilly
6 United States District Judge
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